IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

DISTRICT:

SECOND APPEAL NO. 1511 OF 2005

Office Notes,Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders

Mr.Ajay A.Joshi for the Appellant.

None for the Respondent.

CORAM: S.B.DESHMUKH, J.

DATE : 8TH SEPTEMBER 2006

P.C.:

Heard learned Counsel for the appellant.

2. The present appellant was the defendant in Regular Civil Suit No. 517 of 1993 filed by the respondent / plaintiff in the Court of the learned Civil Judge, Junior Division, Pandharpur, Dist. Solapur, for removal of encroachment and possession of the encroached area to the extent of 0H 3R. as described in para 1-B of the plaint and for mesne profit.

Parties hereinafter are referred to their status, as plaintiff and defendant, in Regular Civil Suit No.517 of 1993.

3. The Plaintiff has filed the Regular Civil Suit No. 517 of 1993 on 13th December, 1993. Subject matter of the suit is, as described in paragraph 1-A, agriculture land bearing Gat No.286/1. Boundaries of this land are given in paragraph 1-A of the suit. In paragraph 1-B of the suit, the encroached portion i.e. O.3 R. from Gat No. 286/1 is given. From this description, it appears that land Survey No.304/1 is situated towards southern side of the encroached portion of land Gat No. 286/1. Statement is made in paragraph 1 of the plaint that the land of the defendant bearing Gat No.304/1 is adjoining to the suit property and to the southern side. There is a common band in between the agricultural lands bearing Gat No.286/1 owned by the

plaintiff and Gat No.304/1 owned by the defendant. The defendant demolished the common band and encroached upon the suit land. The plaintiff applied to the District Inspector of Land Record, Solapur, for measurement of the suit property and, accordingly, suit property was measured on 23rd April, 1993. In this measurement, it was revealed that the defendant, owner of Gat No.304/1, has committed an encroachment over the suit property to the extent of OH 3R.

4. The defendant, after service of summons, entered appearance and filed written statement, Exh.13. In the written statement, it was pleaded on behalf of the defendant that he was not present at the time of measurement on 23rd April, 1993. The defendant, has shown readiness and willingness for measurement, through Court. According to the defendant, he was cultivating the suit land Gat No.304/1 and has not committed any encroachment

over the suit property. The defendant has also pleaded that the plaintiff is not owner of land Gat No.286/3 and therefore, encroachment which is shown to have been committed by the owner of land Gat No.304/1 over the land Gat No.286/3 is not legal and proper.

5. The trial Court, considering the pleading of the parties, framed as many as six issues and decreed the suit filed by the plaintiff, by the judgment and decree passed on 30th July, 2004. The defendant, had filed an appeal under Section 96 of the Code of Civil Procedure, read with Order 41, in the Court of the learned Additional District Judge, Pandharpur, Dist. Solapur. It was Regular Civil Appeal No. 99 of 2004. The Additional District Judge confirmed the Judgment and decree passed by the trial Court. The learned Additional District Judge had framed six points for determination.

6. The trial Court, has referred to the evidence of P.W.2 - Sopan Laxman Kale, at Exh.56. Papers including measurement map, showing the alleged encroachment are at Exh.57. The trial Court has referred to the pleading of the defendant regarding location and situation of the land Gat No.286/1 owned by the plaintiff and Gat No.304/1 owned by the defendant. The land Gat No.286/3 is owned by one Shri Vithal Atkale. After referring this pleading of the defendant, the trial Court, in paragraph 8 of the judgment, has referred to the admission given by the defendant in his cross examination that the land of the plaintiff (suit property) is adjoining and to the northern side of his land (Gat No.304/1). Referring this admission of the defendant, the trial Court, accepted the case of the plaintiff that the land owned by the defendant, Gat No.304/1, is situated towards the southern side of the suit property i.e. land Gat No.286/1. The trial

Court, thereafter, referred to the evidence of Cadastral Surveyor, P.W.2 Sopan Kale and the sub-division of land Survey No.286/1 to 286/4. The trial Court has also referred to the map given by Talathi and sub-divisions of Block No.286/1 to 286/4. After appreciation of the oral and documentary evidence, the trial Court has, recorded a finding on question of fact regarding the alleged encroachment, in favour of the plaintiff and passed a decree in favour of the plaintiff.

7. The first appellate Court, also referred to the oral as well as documentary evidence and pleading of the parties. The first appellate Court has concurred with the trial Court regarding the question of fact i.e. alleged encroachment, by the defendant to the extent of OH 3R.

8. Learned Counsel for the appellant, invited my attention to the copy of

the map, which is made available. On my query, he submits that the map is exhibited document and is at Exh.75 in the trial Court. He has also referred to the evidence of P.W.2 Sopan Kale. According to him, Mr. Sopan Kale has given numbers i.e. sub-divisions of plot No.286/1 to 4 from the northern side to southern side. He has pointed out the contradiction in the sub-division given by the Cadastral Surveyor and by the Village Officer i.e. Talathi. According to him, there is no pleading as per evidence of P.W.2 Sopan Kale, on behalf of the plaintiff. Since, it is a case variance in pleading and proof as per Order 6 Rule 2 of the Code of Civil Procedure, according to him, substantial question of law is involved in this second appeal. Learned Counsel for the appellant relied on the judgment of the Apex Court in the case of Rajgopal (Dead) by L.Rs. v/s Kishan Gopal and another, reported in (2003) 10 SCC

653.

9. I have given anxious consideration to the submission of the learned Counsel for the appellant / defendant. I have also considered the alleged part of the oral evidence of P.W.2 Sopan Kale, Cadastral Surveyor. It is a matter of common knowledge, that Village Officer is not an expert person, regarding the sub-division of agricultural land and measurement thereof. The village maps issued by the District Inspector of Land Record from District Head Quarter are in the custody of the Village Officer. In case of demand, Talathi / Village Officer is issuing such certified copy of map in relation to particular survey number, to the applicant. In the present case, the suit property was measured by the expert i.e. Cadastral Surveyor, on the application of the plaintiff. Written Statement of the defendant refers this measurement. However, contention is

raised that defendant was not present. It is to be noted that, it is not the case of the defendant that he was not served with the notice by the Cadastral Surveyor and the survey was done behind and back of the defendant. Defendant was very well aware that the measurement was fixed on a particular date i.e. 23rd April, 1993. Despite this fact, it appears that he chose to remain absent. Apart from this, Sopan Kale was available for cross-examination. P.W.2 - Sopan Kale, for convenience renumbered the sub division of land Gat No.286 and after carrying on the measurement prepared the map. He found that the defendant had committed an encroachment to the extent of OH 3R. The plaintiff is a lay man. All he wants to say in a suit that the land of the defendant bearing Gat No.304/1 is abutting to his land and to the southern side of his land. The fact of encroachment by the defendant is alleged by him in the suit. Such

suits are to be decided mainly appreciating the evidence of cadastral surveyor. Exactly that is done in the present case. The courts below have appreciated and accepted the evidence of cadastral surveyor in relation to the map drawn and placed on record. On a proper appreciation of the evidence, the trial Court has recorded finding regarding question of fact that the alleged encroachment in favour of the plaintiff and that same is concurred by the first appellate court. In my view, no substantial question of law, within the para meters of Section 100 of the Code of Civil Procedure is involved. In second appeal, no third trial is permissible.

10. In the result, second appeal is dismissed in limine.

Sd/-

(S.B.DESHMUKH, J.)